Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-760

PEDRO DELAROSA FLORES,
Petitioner,

versus

THE STATE OF TEXAS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

MARK SMITH & ASSOCIATES
1220 Broadway, Suite 1820
Lubbock, Texas 79401

Attorney for Petitioners

SCOFIELDS' QUALITY PRINTERS, P. O. BOX 53096, N. O., LA. 70153 - 504/822-1611

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No.

PEDRO DELAROSA FLORES,
Petitioner,

versus

THE STATE OF TEXAS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

The Petitioner, Pedro DeLaRosa Flores, prays that a writ of certiorari issue to review the judgment of the Texas Court of Criminal Appeals in case number 57,-763. Pedro DeLaRosa Flores, Appellant v. The State of Texas, Appellee.

OPINIONS BELOW

The opinions and judgments of the Texas Court of Criminal Appeals and the 72nd District Court of Lub-

bock County, Texas are contained in Appendices A and B, hereinafter.

JURISDICTION

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1257(3). The decision of the Texas Court of Criminal Appeals was rendered September 19, 1979 in which a timely Petition for Rehearing was denied En Banc, and is attached as Appendix A.

QUESTION PRESENTED

Whether Petitioner was denied his right to a fair and impartial jury because of the jury selection process of the 72nd District Court of Lubbock County, Texas which systematically excludes Mexican-Americans from jury service.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution:

Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

Course of Proceedings and Disposition in Court Below

Petitioner, Pedro DeLaRosa Flores, was charged with the criminal violation of possession of more than four ounces of marijuana. An indictment was returned on January 17, 1975. Arraignment was waived on January 23, 1975. Trial by jury was set for the week of June 16, 1975.

On June 20, 1977, counsel for petitioner moved to quash and suppress the jury panel. Said motion was denied and the cause proceeded to trial on June 20, 1977.

Petitioner was found guilty by the jury and the Court entered a judgment and commitment order of three years in confinement suspended, with Petitioner to be on probation for three years.

It is the denial of the motion to suppress and quash the jury panel that Petitioner asserts in this appeal as error by the trial court.

In an en banc opinion of September 19, 1979 a Panel of the Texas Court of Criminal Appeals denied the Petitioner's Motion for Rehearing. Petitioner asserts that the Panel erred (in denying the motion for rehearing), as such denial conflicts with prior Supreme Court decisions.

Statement of Facts

Testimony elicited at trial showed that census figures for the year 1970 placed the percentage of Spanish-surnamed individuals at 17.6 percent. Other testimony, including testimony of an elected official of the State of Texas (Representative Froy Salinas, District 75B) placed the percentage of Spanish surnames from school enrollment figures at 32 percent. His testimony established that the percentage of Spanish-Americans in Lubbock County was increasing.

Appellant asserts that the lists of persons summoned for and serving as Grand Jurors during the relevant time periods (Defendant's Exhibit No. Four) show an unconstitutionally discriminatory pattern of exclusion of Mexican-Americans from the Grand Juries impaneled in Lubbock County.

REASONS FOR GRANTING THE WRIT

The Honorable Panel of the Texas Court of Criminal Appeals erred in denying the motion for rehearing of Petitioner and the 72nd District Court of Lubbock

County erred in denying Petitioner's Motion to Quash the Jury Panel which was based on Constitutional grounds that Mexican-Americans were systematically excluded from jury service.

A citizen accused has guaranteed to him under the Constitution the most basic right known to our system of government: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an *impartial* jury . . ." U.S. Constitution, Sixth Amendment (Emphasis Added). A jury drawn from a system that excludes a class of individuals by reason of race, especially when the accused is a member of that class, is not such an impartial jury. *Whitus v. Georgia*, 385 U.S. 545, 87 S.Ct. 643, 17 L.Ed.2d 599 (1967); *Alexander v. Louisiana*, 405 U.S. 625, 92 S.Ct. 1221, 31 L.Ed.2d 536 (1972).

Mexican-Americans are members of a class which has been recognized as "identifiable" for purposes of determining racial exclusion. *Hernandez v. Texas*, 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866.

Petitioner, a Mexican-American, moved to quash the petit jury based upon his constitutional right to an impartial jury. Through statistical as well as opinion, reputation, and other proof, he established that a significant portion of the population of the Lubbock County, were Mexican-American. Census figures place the percentage at 20.5%. Testimony of witnesses placed it higher, and demonstrated that the percentage was rising.

Castaneda v. Partida, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498, establishes the rule to be applied in determining whether a jury selection procedure passes constitutional muster where race is a factor:

> "In order to show that an equal protection violation has occurred in the context of grand jury selection, the defendant must show that the procedure employed resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs . . . . . *Once the defendant has shown substantial underrepresentation of his group, he has made out a prima facie case of discriminatory purpose,* and the burden then shifts to the State to rebut that case." (Emphasis added) *Castaneda, supra* 430 U.S. at 494, 495.

In the case at bar, defendant has quite clearly shown such a substantial underrepresentation; yet the state has utterly failed to rebut the evidence and the prima facie case.

Castaneda establishes a two-prong basis for determination of the prima facie case: first, that the group is a recognizable, distinct class; and second, that the underrepresentation be proved over a significant period of time, by comparison of percentage of the class included in the jury selection process. 430 U.S. at 494.

Castaneda establishes another element that may be proved to support the claim of discriminatory practice:

proof of a system not racially neutral. "Finally, as noted above, a selection procedure that is susceptible of abuse or is not racially neutral *supports the presumption of discrimination raised by the statistical showing.*" (Emphasis added). *Castaneda, supra,* 430 U.S. at 494. Herein lies the error of the Panel in its En Banc Decision: it failed to distinguish a prima facie showing and presumption of discrimination from the shifting of the burden of proof to the state. *Castaneda* does not require a showing of intentional discrimination; the case holds that the *presumption* of discrimination has arisen prior to any need for a showing of intent.

The proof in *Castaneda* was primarily that of statistics. The Court agreed that these statistics established a prima facie case of discrimination. In the very next sentence, the Court stated: "*Supporting* this *conclusion* is the fact that the Texas system of selecting grand jurors is highly subjective." (Emphasis added) 430 U.S. at 487. The conclusion of discrimination had already been made from statistical evidence. The same conclusion exists in the case at bar. Seven years of grossly disproportionate percentages cannot be ignored. Yet the Government has attempted to do so.

The Supreme Court has had occasion to write on this subject in the context of sex discrimination in *Duren v. Missouri*, ____ U.S. ____, 47 Law Week 4089 (1979). That case held a Missouri jury selection system which allowed women to "opt out" of jury service fatally defective due to the consistently disproportionate

numbers of women on venires. *Duren* repeats the requisite of *Castaneda;* and yet it adds another method of proof of discriminatory system. That proof exists in showing a *consistent, continuing exclusion* of the class from the venires. Mr. Justice White, writing for the Court states:

> "(Duren's) undisputed demonstration that a large discrepancy occurred not just occasionally but in every weekly venire for a period of nearly a year manifestly indicates that the cause of the underrepresentation was systematic — that is, inherent in the particular jury-selection process utilized. . . The resulting disproportionate and consistent exclusion of women from the jury wheel and at the venire stage was quite obviously due to the *system* by which injuries were selected. Petitioner demonstrated that the underrepresentation of women in the final pool of prospective jurors was due to the operation of Missouri's exemption criteria — whether the automatic exemption for women or other statutory exemptions — as implemented in Jackson County." 47 Law Week at 4091.

Where Duren proved a disproportion weekly for one year, Petitioner has proved such exclusion for *seven* years.

The exclusion in *Duren* was systematic; yet the Court did not make any requirement of intent, as would the

Panel's decision in the instant case. On the contrary, the low percentage of women in *Duren* probably came from the ability of the women to "opt out" of the jury pool. This shows no "intent" on the part of the state; yet that selection procedure was declared unconstitutional.

Here, the evidence is overwhelming that such a systematic exclusion exists. Here, the system *is* the problem. The Panel is correct in that appellant does not contend that the District Clerk discriminated in making up the jury panels. But, as noted in *Castaneda*, "sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face." 430 U.S. at 493. Even though the Mexican-American community may and even has succeeded in electing a Mexican-American representative to the state legislature, who testified at trial, such limited successes are inapplicable to a determination of discrimination under any "ruling party" theory. *Castaneda, supra.*

The court in *Rabinowitz v. United States,* 336 F.2d 34 (5th Cir. 1966) incorporated by a footnote a quote from *United States v. Greenberg,* 200 F.Supp. 382 (S.D.N.Y., 1961):

> "The test is not whether voter registration lists are used, exclusively or otherwise, as a source of qualified jurors. The test is whether

> or not the use of such lists results in an array which is a representative cross-section of the community or from which a recognizable group or class of qualified citizens is systematically excluded.

Further, as the court stated in *Camp v. United States*, 413 F.2d 419 (5th Cir. 1969):

> "Use of such lists (voter registration) as the sole source of names for jury duty is constitutionally permissible unless the system results in the systematic exclusion of a cognizable group of class of qualified citizens."

Therefore, the dicta in *United States v. Arlt*, 567 F.2d 1295 is inapplicable; the system must *result* in a constitutionally fair and impartial venire and jury.

The system here creates a substantial variance between the proportion of the Mexican-Americans in the general population and the proportion appearing in the jury panels. The state has failed entirely to rebut the prima facie case of discrimination. The Panel En Banc decision, if allowed to stand, would substantially alter the rule as set forth by the Supreme Court; that it is the state that must provide the accused with an impartial jury made up of his peers, and one drawn from all segments of society, including the race in which he is included. The state has failed to do this; it has failed to rebut the presumption of discrimination established by defendant's evidence.

CONCLUSION

Petitioner respectfully submits that his Court should grant his petition for writ of certiorari and review the decisions of the courts below, and upon hearing reverse the decision below.

Respectfully submitted,

MARK SMITH & ASSOCIATES
1220 Broadway, Suite 1820
Lubbock, Texas 79401

Mark Smith
Attorney for Petitioner

CERTIFICATE OF SERVICE

This is to certify that three true and correct copies of the above and foregoing Petition for Writ of Certiorari to the Texas Court of Criminal Appeals have this the ____ day of November, 1979, been placed in the United States mail, postage prepaid, addressed to Hon. Mark White, Attorney General of the State of Texas, Courts Building, Post Office Box 12548, Capitol Station, Austin, Texas 78711 and one true and correct copy has been mailed to Hon. John T. Montford, Criminal District Attorney, County Courthouse, 904 Broadway, Lubbock, Texas 79401.

Mark Smith

APPENDIX "A"

COURT OF CRIMINAL APPEALS OF TEXAS
CLERK'S OFFICE

Austin, Texas, Sept. 19, 1979

Dear Sir:

I have been instructed to advise that the Court has this day denied the Appellant's Motion for Rehearing En Banc in Cause No. 57,763, PEDRO DELAROSA FLORES vs. THE STATE OF TEXAS, Appellee.

Sincerely yours,

Thomas Lowe, Clerk

APPENDIX "B"

IN THE 72ND DISTRICT COURT
OF LUBBOCK COUNTY, TEXAS

FEBRUARY TERM, A.D. 1977

THE STATE OF TEXAS

versus NO. 15,618

PEDRO DELAROSA FLORES

Filed Aug. 18, 1977

JUDGMENT

ON the 20th day of June, A.D. 1977, this cause was called for trial, and the State appeared by a duly appointed Assistant Criminal District Attorney, and the Defendant PEDRO DELAROSA FLORES appeared in person, in open Court, his counsel, Mark Smith (Employed), also being present.

And the said Defendant PEDRO DELAROSA FLORES having been duly arraigned in open Court, and having pleaded not guilty to the charge contained in the Indictment herein, both parties announced ready for trial; thereupon a jury of good and lawful persons, to-wit: Donald A. Durham and eleven (11) others were duly selected, impaneled and sworn, who, having heard

the Indictment read, and the Defendant's plea of not guilty thereto, and having heard the evidence submitted, and having been duly charged by the Court retired in charge of the proper officer to consider of their verdict, and afterward was brought into open Court by the proper officer, the Defendant and his counsel being present, and in due form of law returned into open Court the following verdict, which was received by the Court and is here now entered upon the minutes of the Court, to-wit:

"We, the Jury, find beyond a reasonable doubt that the defendant is guilty of the offense of possession of a usable quantity of marihuana, as charged in the indictment.

/s/ DONALD A. DURHAM
Foreman"

ON the 21st day of June, A.D. 1977, a finding of guilty having been returned by the jury and evidence having been offered by the State and the Defendant as to the prior criminal record of the Defendant including his general reputation and his character, and the Court having heard and considered the evidence offered,

IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED by the Court that the Defendant PEDRO DELAROSA FLORES is guilty of the offense of Possession of Marihuana: to-wit more than four (4) ounces, a Third-Degree Felony, committed on January 2, 1975, as charged in the indictment, as found by the jury, and that he be punished by confinement in the

Texas State Penitentiary for a term of three (3) years, and that the State of Texas do have and recover of the said Defendant PEDRO DELAROSA FLORES all costs in this prosecution expended for which execution will issue, and that the said Defendant PEDRO DELAROSA FLORES be remanded to jail to await the further order of this Court herein.

And it appearing from the proof and the findings of the Court that the Defendant has not before been convicted of a felony in this State or another State, it is ordered and adjudged by the Court that the imposition of Sentence of the Judgment of conviction in this cause be suspended and the Defendant, PEDRO DELAROSA FLORES, is hereby placed on Probation for a period of three (3) years under the terms and conditions of the Adult Probation and Parole Law of the State of Texas, as amended, upon the following terms and conditions of Probation:

(a) Commit no offense against the laws of this or any other State or the United States;

(b) Avoid injurious or vicious habits;

(c) Avoid persons or places of disreputable or harmful character;

(d) Report to the Probation Officer as directed. Defendant is paroled to John L. Shropshire, Adult Probation Officer, or his successors in office; Defendant shall report this day in person, and thereafter as directed by the Probation Officer but at least once every month, in

writing, on or before the 5th day of each month hereafter, and each of said days ordered to report is a separate condition of this probation;

(e) Permit the Probation Officer to visit him at his home or elsewhere;

(f) Work faithfully at suitable employment as far as possible;

(g) Remain within the State of Texas and County of Lubbock or Lynn County unless the Court consents in writing to a change of residence;

(h) Support all his dependents;

(i) Report any change of address to the Probation Office of Lubbock County, Texas, in writing, within twenty-four (24) hours;

(j) Memorize the terms and conditions of this probation;

(k) Pay Court Costs to the Adult Probation Officer of Lubbock County, Texas, or his successor in office, the sum of $62.00 in three (3) monthly installments of $20.00 each, except the last installment for the sum of $22.00 with each monthly installment being due on the 5th day of each month beginning on the 5th day of August, A.D. 1977 and continuing through the 5th day of October, A.D. 1977; the payment of each installment is a separate condition of this probation;

(l) Pay $10.00 per month commencing on November 5, A.D. 1977 as a probation fee until the probation period expires;

(m) Pay (Restitution) (Fine) to the Adult Probation Officer of Lubbock County, Texas, the sum of $_____ in _____ monthly installments of $_____ each except the last installment for the sum of $_____ with each monthly installment being due on the _____ day of each month beginning on the _____ day of _____, A.D. 19___ and continuing through the ___ day of _____, A.D. 19___;

SIGNED AND ENTERED this the 17th day of August, A.D. 1977.

/s/ ILLEGIBLE
Judge Presiding

STATE OF TEXAS
COUNTY OF LUBBOCK

I, Verna Boyd, District Clerk in and for the County and State above named, do hereby certify that the within instrument is a true and correct copy of like instrument now on file in my office.

11th Day of October, 1979.

Verna Boyd, District Clerk

/s/ GAYLA MARTIN
Deputy

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PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

SUPPLEMENTAL APPENDIX

MARK SMITH & ASSOCIATES
1220 Broadway, Suite 1820
Lubbock, Texas 79401

Attorney for Petitioners

SCOFIELDS' QUALITY PRINTERS, P. O. BOX 53096, N. O., LA. 70153 - 504/822-1611

SUPPLEMENTAL APPENDIX

PEDRO DELAROSA FLORES,
Appellant,

versus No. 57,763

THE STATE OF TEXAS,
Appellee.

Appeal from LUBBOCK County

OPINION

This is an appeal from a conviction for the possession of more than four ounces of marihuana. The penalty was assessed at three years' imprisonment, but imposition of the sentence was suspended while appellant was placed on probation.

Appellant initially complains of the trial court's refusal to disclose the name of the confidential informer who provided the tip leading to the discovery of the marihuana in appellant's vehicle. Appellant claims the informant was crucial to his defense that he knew not of the marihuana's presence or its origination. There was no evidence presented to the trial court in the hearing on appellant's motion to disclose the informant's name that even hinted at the informant's involvement in the offense, his presence at the scene of the offense, or his role other than as an informant. The witness

who did testify regarding the informant stated he was not present at the arrest or search and he was not aware of any involvement of the informant in the offense. More than conjecture is required from a defendant who seeks the disclosure of a confidential informant's identity; he must show the informant to have been present at the time the offense occurred or to have been a material witness to the transaction or appellant's knowing commission of the offense. Brewer v. State, 572 S.W.2d 719; Varela v. State, 561 S.W.2d 186. Appellant's first ground of error is overruled.

Appellant challenges the admission of the marihuana seized from his vehicle as constituting the direct fruit of an unlawful search and seizure. Fourth and Fourteenth Amendments, U.S. Constitution; Article I, Section 9, Texas Constitution. Appellant filed a pretrial motion to suppress this evidence and a hearing was conducted after which the motion was overruled. At the hearing, Detective Sergeant Park testified that at approximately 8 p.m. on January 2, 1975, he received a phone call from a prior reliable informant. The informant advised Sergeant Park, according to the officer's testimony, that a "delivery"[1] was to be made shortly in the vicinity of 35th Street and Avenue A in Lubbock. The informant advised that the parties

1 The State presented two police officers as witnesses at the hearing on appellant's motion to suppress. There was never any testimony that the tip related to the "delivery" of any contraband of any sort. However, at trial and before introducing the marihuana into evidence, Sergeant Park elaborated on the contents of the tip to show that it was to have been a delivery of marihuana and that appellant might be carrying a gun.

making the delivery would be two Spanish individuals, one male named Pete Flores, in a late model, blue and white Chevrolet[2] pickup truck from Tahoka. The informant stated only that the tip was information he had without elaborating on how he obtained such information.

Sergeant Park immediately went to the area in question and observed a blue and white pickup making a legal U-turn on 37th Street and was heading for Avenue A. He accelerated to confirm his observation, noting a "Tahoka Bulldogs" sticker on the vehicle. He signaled the vehicle to stop and ascertained the driver's identification as Pedro Flores. Other officers arrived on the scene and in requesting appellant's companion to exit, observed a seven-inch moon-shaped knife on the floorboard. The companion admitted ownership of the knife and was arrested. The officers then searched the vehicle, discovering a .45 caliber automatic pistol in the glove compartment[3] and a plastic bag with 22 baggies of green leafy substance, later determined to be marihuana, behind the fold-down seat.

2 The second officer who testified at the hearing related that Sergeant Park, who took the informant's call, asked for his assistance and told him to look for a white over blue *Ford* pickup. He also testified that the vehicle stopped was a blue and white *Ford*.

3 Sergeant Park testified that when signaling appellant's vehicle to stop, he noticed appellant lean forward as if towards the glove compartment.

Appellant relies on Cole v. State, 484 S.W.2d 779, Rushing v. State, 500 S.W.2d 667, and Kaser v. State, 505 S.W.2d 806, for the proposition that the observations of Sergeant Park did not corroborate the informer's tip concerning appellant's possession and/or delivery of marihuana, thereby negating any probable cause for his arrest and vehicle search. Since no information was imparted to Sergeant Park on *how* the informant acquired his information, we assume it was hearsay and insufficient, in itself, to satisfy the second prong of the *Aguilar*[4] standards for evaluating a "tip" as the basis for probable cause.[5] The so-called "second prong" of *Aguilar*, supra, provides that the magistrate must be provided with the underlying circumstances which tend to show that the information obtained by the informant was obtained in a reliable manner.

Hearsay, when corroborated by independent police surveillance, can provide probable cause for a search or arrest. Spinelli v. U.S., 393 U.S. 410, 89 S.Ct. 584 (1969). Further, particularity and specificity in an informant's tip, when confirmed by police observations, can cure an initial defect in satisfying *Aguilar's*, supra, second prong. Draper v. U.S., 358 U.S. 307, 79 S.Ct. 329 (1959).

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4 Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509 (1964).

5 The standards for evaluating information and its basis for a probable cause determination are the same for warrantless arrests and searches as for obtaining such warrants. Whitely v. Warden, Wyoming State Penitentiary, 401 U.S. 560, 91 S.Ct. 1031 (1971).

The cases relied on by appellant are clearly distinguishable and lend him little support in his contention. In *Cole*, supra, the tip failed both *Aguilar* prongs, reliability of the informant and reliable acquisition of the information, yet the police responded quickly with a show of force. In *Rushing*, supra, an unknown and untested informant provided a bare-bones tip two hours before the arrest and search. The arrest and search in that case suffered from a number of deficiencies and the general statement that "the information gained by observations must in some sense be corroborative of the informer's tip" (Id. at 670) must be read in context. In context, this Court noted numerous matters that the tip did not relate which are present here: designated location, use of a vehicle, proposed drug transaction, and time of the transaction. Similar omissions and distinctions exist with respect to the tip in *Kaser*, supra. The cases relied on by appellant cannot be construed as erasing the combined authority of *Spinelli* and *Draper*, supra, from our jurisprudence. Such a conclusion is negated by this Court's continued reliance on those cases and their principles. Rangel v. State, 444 S.W.2d 924; Almendarez v. State, 460 S.W.2d 921; Jordan v. State, 504 S.W.2d 490.

We therefore conclude that the exigency of the situation confronting Sergeant Park (a pending delivery of marihuana in a mobile pickup truck) and his observations corroborating the particulars of the tip (the "Tahoka Bulldogs" sticker; vehicle make, model, and color; number and race of occupants; gender of the

driver; location of the vehicle; time of observation; and identity of driver), thereby assuring himself that his informant obtained his information in a reliable manner, provided a lawful and constitutional basis for the warrantless action taken. We decline to adopt the necessary implication of appellant's position that before any warrantless action could be taken, Sergeant Park should have first waited to observe the actual delivery. Here, every detail of the tip was corroborated before the search was conducted, save for the presence of the gun and marihuana. Furthermore, the information available to Sergeant Park at the time he stopped the vehicle to ascertain the identity of the occupants was sufficient to justify the lesser intrusion of an investigative stop. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968). Accordingly, appellant's second ground of error is overruled.

Appellant contends that the trial court erred in denying his motion to quash the indictment because the grand jury selection process was plagued by racial discrimination against Mexican Americans. Castaneda v. Partida, 430 U.S. 482, 97 S.Ct. 1272 (1977). Appellant was indicted during the January term of the 137th Judicial District Court (January 17, 1975). The offense was committed on January 2, 1975. The January term of the 137th District Court for 1975 commenced on January 6, 1975. Article 199 (137), V.A.C.S.

Article 19.27, V.A.C.C.P., calls for challenges to the legality of the grand jury to be made before its impanelment. On April 25, 1975, appellant's attorney of

record requested and was granted permission to withdraw. Appellant has at all times been represented by retained counsel. Present retained counsel requested a continuance successfully on July 8 and November 10, 1975. The record is silent for 1976. In 1977 additional motions were filed by present counsel. Not until June 20, 1977, was a challenge made against the grand jury selection process. We must conclude that the combined failure to timely lodge a challenge under Article 19.27, supra, and to lodge a challenge before the passage of nearly two years operates as a dispositive procedural default or waiver of any error alleged. Muniz v. State, 573 S.W.2d 792. Appellant's third ground of error is overruled.

By way of a supplemental brief filed only in this Court on May 9, 1979, over a year after the record was filed here, appellant asserts a similar challenge against the petit jury based on the same evidence adduced on his challenge to the selection of grand jurors. The ground of error was not timely raised under Article 40.09(9) and is therefore not before us for review.

There being no reversible error, the judgment of conviction is affirmed.

PER CURIAM

(Delivered May 23, 1979)

By Panel No. 3, 2nd Quarter,
1979, composed of
Wendell A. Odom, Judge
W. T. Phillips, Judge
W. C. Davis, Judge

CERTIFICATE OF SERVICE

I hereby certify that I have this date mailed three copies of the foregoing Supplemental Appendix to the United States Court of Appeals for the Fifth Circuit;to the Honorable Wade H. McCree, Jr., Solicitor General of the United States, Department of Justice, Washington, D.C., 20530; and one copy to the Honorable Roger McRoberts, A.sistant United States Attorney, C-201, U.S. Courthouse, 1205 Texas Avenue; Lubbock, Texas 79401, by placing the same in the United States Post Office, first class postage prepaid, said service being made in compliance with United States Supreme Court Rule 33.

MARK SMITH